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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARCUS EUGENE HUNLEY, Appellant.	2 CA-CR 2007-0176 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061789

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Wanda K. Day
Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Marcus Hunley was convicted of four counts of armed robbery, one count of kidnapping, two counts of aggravated assault, and one count

of assault. All charges arose from a series of convenience store robberies. The trial court sentenced Hunley to a combination of concurrent and consecutive prison terms totaling thirty-one years. Hunley now appeals, arguing the court erred in denying his second and third motions to substitute counsel and his request to represent himself. Because the trial court did not abuse its discretion and did not err, we affirm.

¶2 Hunley first argues the trial court erred by failing to conduct an appropriate inquiry into the basis for his motion for substitution of counsel made on the second day of trial. We review the trial court's decision on a motion to substitute counsel for an abuse of discretion. *State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998). "A trial court abuses its discretion if it fails to inquire into the basis for the defendant's dissatisfaction with counsel or fails to conduct a hearing on the defendant's complaint after being presented with specific factual allegations in support of the request for new counsel." *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007). "The nature of the inquiry will depend upon the nature of the defendant's request." *State v. Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d 1056, 1059 (2004).

¶3 On the first day of trial, Hunley moved to represent himself, and he and the court extensively discussed his relationship with his counsel. Hunley eventually withdrew his motion, stating: "Well, as long as I'm able to give [counsel] some questions that I need answered." The next day, in his pro se motion for substitution of counsel, Hunley stated that counsel had lost exculpatory evidence, that "counsel had refused certain litigation for which the defendant feels is necessary in the defendant's case," that he and counsel had

difficulty communicating, and that counsel was incompetent and ineffective. The court asked Hunley if there was anything further he wanted the court to consider. Hunley stated he and counsel had irreconcilable differences and also referred to a motion regarding a warrant on which the court had previously ruled. The court made findings with respect to the factors set forth in *State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987), and denied Hunley's motion.

¶4 Given the nature of the allegations raised in Hunley's motion and the court's extended discussions with Hunley regarding his motion to proceed pro se and his motion for substitution of counsel, we find nothing improper in the procedure the court followed. *See Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059 (formal hearing may not be required to address general disagreements over strategy or concerns about attorney competence); *see also State v. Henry*, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997) (disagreements over tactical decisions raising concerns about attorney competence more properly analyzed in post-conviction relief proceeding).

¶5 Hunley next argues the trial court erred by denying his motion for substitute counsel made on the second day of trial. We review for an abuse of discretion. *Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580.

¶6 A criminal defendant has a Sixth Amendment right to representation. U.S. Const. amend. VI; *see also* Ariz. Const. art. II, § 24; A.R.S. § 13-114(2). But he or she is not "entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580. When considering a request for new counsel,

the trial court must "balance the rights and interests of a defendant with judicial economy," *id.*, by considering the following factors:

> whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

LaGrand, 152 Ariz. at 486-87, 733 P.2d at 1069-70. "Unlike other factors, the presence of a genuine irreconcilable conflict *requires* the appointment of new counsel." *Henry*, 189 Ariz. at 547, 944 P.2d at 62. But to show an irreconcilable conflict, "a defendant's allegations must go beyond personality conflicts or disagreements with counsel over trial strategy." *State v. Cromwell*, 211 Ariz. 181, ¶ 30, 119 P.3d 448, 454 (2005). Repeated claims of "irreconcilable conflict" and a proclivity to change counsel "lend[] strong support" to a court's decision to deny a motion to substitute counsel. *Henry*, 189 Ariz. at 547, 944 P.2d at 62.

¶7 In this case, the trial court had already granted Hunley one motion for substitution of counsel several months before trial. Hunley then moved to proceed pro se on the first day of trial and moved again for substitution of counsel on the second day of trial. The trial court denied the motion for substitution of counsel, making appropriate factual findings.

¶8 Hunley argues that the trial court found an irreconcilable conflict, that Hunley had a "complete breakdown in communication" with his attorney, and that his attorney abdicated his role as an advocate. Hunley contends his refusal to sit in the courtroom after

the court denied his motion shows the depth of the conflict with his attorney. Hunley asserts that therefore, appointment of new counsel was required. The trial court actually found that, "according to Mr. Hunley," there was an irreconcilable conflict but suggested that the source of the conflict was Hunley's behavior in general and that it would probably recur with new counsel.

¶9 After reviewing the discussion of Hunley's motion to proceed pro se and his motion for substitution of counsel, we conclude the trial court could properly find that the purportedly irreconcilable conflict between Hunley and his counsel consisted of nothing more than disagreements over defense strategies as well as some apparent personality issues. The facts here "do not resemble the intense acrimony and depth of conflict found in *Moody*" that would lead us to conclude the court abused its discretion in denying either motion. *Cromwell*, 211 Ariz. 181, ¶¶ 36-37, 119 P.3d at 454-55 (noting defendant in *Moody* developed "'obsessive hatred'" for attorney and relationship became almost physically violent).

¶10 Moreover, the record supports the trial court's findings that new counsel would be confronted with the same problems; that Hunley had demonstrated a proclivity to change counsel; that the request was untimely; that two years had elapsed since the offenses were committed; that the witnesses, who were present and ready to testify, would be inconvenienced by the delay; and that Hunley's current counsel was competent. Additionally, the record shows Hunley's counsel did not abdicate his role as advocate. And Hunley cannot compel the appointment of new counsel by refusing to attend his trial. "[W]e

defer to the discretion of the trial judge who has seen and heard the parties to the dispute." *Id.* ¶ 37. The court here considered Hunley's arguments, reviewed the necessary factors, and exercised reasonable discretion in denying his request. *Id.*

¶11 Hunley also argues the trial court erred in denying his third motion to substitute counsel, which he made orally at sentencing.[1] Hunley asserts that the court erred in again failing make an appropriate inquiry and in failing to appoint new counsel for purposes of sentencing. But the court allowed Hunley to explain the grounds for his motion, which, by his own assertion, were the same as for the motion he made during trial. The court then found again that, "according to Mr. Hunley," an irreconcilable conflict existed but that the source of the conflict appeared to be Hunley's refusal to listen to counsel's advice. The court also found that new counsel would be confronted by the "same or similar issues," that substitution of counsel would significantly inconvenience the court and the victims, and that his current counsel was competent. Again, given the nature of Hunley's allegations, the court's inquiry was sufficient. *See Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059. The record supports the court's findings, and we conclude the court did not abuse its discretion in denying Hunley's third motion to substitute counsel. *See Cromwell*, 211 Ariz. 181, ¶ 37, 119 P.3d at 455.

¶12 Hunley last argues the trial court erred in denying his request to proceed pro se. But, after a colloquy during which the court explained some of the consequences of self-

[1]Hunley claimed to have filed a written motion, but the trial court stated it had not received such a motion, and the record does not contain one.

representation, Hunley withdrew his request by agreeing to proceed with his attorney. Thus, the court did not deny his request or thereby commit error. Hunley suggests the court erred in "trying to talk [him] out of self-representation" and in asking him to reconsider whether he wanted to represent himself or instead proceed with his attorney. "Before a defendant may be allowed to waive counsel and represent himself, 'he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and (that) his choice is made with eyes open.'" *State v. Hartford*, 130 Ariz. 422, 424, 636 P.2d 1204, 1206 (1981) (alteration in *Hartford*), *quoting Faretta v. California*, 422 U.S. 806, 835 (1975). The court did not err in explaining the ramifications of Hunley's choice and in asking him to confirm whether he wanted to proceed with or without counsel.

¶13 For the foregoing reasons, we affirm Hunley's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge